Mr Campbell of Shaw
& Mure of Caldwalls

22

January 28. 1760.

REPLIES

FOR

Daniel Campbell of *Shawfield*, *William Graham* younger of *Gartmore*, Esqs, and *Alexander Cunnynghame* Clerk to the Signet,

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TO

The ANSWERS of *William Muir* of *Caldwall*, Esq; to their Petition and Complaint.

THE Petition and Complaint has so fully set forth the solid Grounds that occur in Law, to take off the Objections made to the Petitioners Titles, that a short Reply will be sufficient, to remove the ingenious Glosses thrown out by the Respondents, to give a Colour to their Objections.

The Objections offered to the Titles of Mr *Campbell* and Mr *Graham*, stand entirely upon the same Foundation, and may be jointly considered.

The *first* Objection is founded upon the Entail of the Estate of *Glencairn*, of which the Superiorities here conveyed to the Petitioners were a Part. It is objected, "That though the "Act of the 20th of the King allows Proprietors of entailed "Estates to sell to their Vassals the Superiorities of their Lands, "upon laying out the Price in terms of the Entail; yet the "Intention of the Act was, to infranchise the Vassals, that "they might become the immediate Vassals of the Crown: Object. I.

" That it is neceſſary the Superior ſhould reſign in the Hands " of the Crown for new Infeftment to be granted to the Vaſ- " ſal; and that the Superiority ſhould be veſted in his Perſon " by Infeftment, and conſolidated with the Property: That " in this Caſe, the ſalutary Intention of the Act was pervert- " ed, by the Earl's conveying the Superiority to Mr *Porter-* " *field* the Vaſſal, who, after expeding a Charter under the " Great Seal, reconveyed the ſame to the Petitioners in Life- " rent, and the Earl in Fee; ſo that Mr *Porterfield* continues " Vaſſal as much as he was before, contrary to the Deſign of " the Act."

Anſwer. But here the Reſpondent miſtakes the Import of the Act. The Intent of it was, to put it in the Power of Superiors whoſe Eſtates were entailed, to convey the Superiorities to the Vaſſals of the Lands, whereby they might have it in their Power, if they ſo inclined, to hold of the Crown. But the Act lays no Reſtraint either upon the Superior or the Vaſſal. The Superior is not bound to ſell, nor the Vaſſal to buy. Each of them is left at Liberty to do as he pleaſes. And far leſs is the Vaſſal laid under any Limitation, after he has bought the Superiority, that he muſt retain it, and keep it for ever after united with the Property. In all theſe Matters, the Parties are left at abſolute Freedom. All that the Act does is, to relieve the Superior from the Fetters of the Entail, and to put him at Liberty to diſpoſe of the Superiority, if he has a Mind, upon doing Juſtice to the ſucceeding Heirs, by ſettling the Price, ſo as it may, with equal Certainty, be ſecured for their Behoof, when they ſhall come to have Intereſt therein, by the Order of Succeſſion limited in the Entail.

And therefore, although the Vaſſal is to have it in his Power, if he pleaſes, to conſolidate the Property with the Superiority; yet there is nothing in the Statute to oblige him ſo to do unleſs he inclines. As he may ſell the whole Lands, ſo he is equally at Liberty to ſell the Superiority and retain the Property; or, *vice verſa*, to retain the Superiority and diſpoſe of the Property,

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ty, if he is under no other Limitation thereanent. And as he may ſell either the one or the other to any third Party, it is obvious there is nothing to hinder him to ſell either to his former Superior; who, if he purchaſes the Superiority, will thenceforth poſſeſs the ſame as an unlimited Fee, having already done Juſtice to the Entail, by veſting the Price or *Surrogatum* in favour of the ſame Heirs and under the ſame Limitations as the Statute directs.

Nor does the Reſpondent ſeem to diſpute, that, after Infeftment, the Vaſſal might diſpoſe of his Superiority in ſuch manner as he inclines; but he ſeems to think, or at leaſt would have it thought, that Infeftment ought firſt to be taken in the Perſon of the Vaſſal, upon no other Foundation, but that the Act declares it lawful to Superiors poſſeſſed of tailzied Eſtates, "to ſell to the Vaſſals, or any of them, the Superiorities over "their reſpective Lands, at ſuch Prices as the Parties ſhall a-"gree for, and thereupon to reſign ſuch Lands for new Infeft-"ment to be granted to ſuch Buyer of his own Superiority, any "Law, Charter, Tailzie, or other Act or Deed to the contra-"ry notwithſtanding."

Were the Law to be conſtructed in this Senſe, that every Vaſſal muſt be infeft before he can diſpone, it would anſwer no good Purpoſe. The only Effect would be to increaſe the Expence of the Parties, and the Profits of thoſe to whom ſuch Perquiſites are due, without any Benefit to the Public or to either Party. But the Law ſays no ſuch Thing: It authoriſes the Superior to ſell upon re-employing the Price, and to reſign the Lands *in favorem* of the Vaſſal for new Infeftment. The Diſpoſition and Procuratory to be granted in favour of the Vaſſal is not limited to his Perſon ſo as not to be *tranſmiſſible* to *Heirs* or *Aſſignies*. If the Vaſſal dies after receiving a Diſpoſition, his *Heir* may make up a Title to it, and expede the Charter and Infeftment; ſo may his *Aſſigny*, if he thinks fit to aſſign it. Here the Reſignation was actually made, and accepted by the Crown, in favour of Mr *Porterfield* the Vaſſal, and a Charter

was

was expede in his Name: And there is ſurely nothing in the Act to hinder him to convey it as he pleaſed; or even, had he conveyed the Diſpoſition before reſigning, there is no Foundation from the Act to diſpute that it was an effectual Conveyance, and behoved to tranſmit the Superiority he had acquired to the Diſponee.

And therefore it is unneceſſary to add, though it is alſo true, that the whole of this Inquiry anent the Conſtruction of the Act is entirely foreign to the preſent Queſtion, and no wiſe competent to the Reſpondent, nor to any of the Freeholders. All that they are to inquire is, Whether the Lands are veſted in the Claimant by Charter from the Crown? and, Whether the Claimant is in Poſſeſſion of the Lands or Superiority under which he claims? But they have no Title to inquire into Objections that may be competent to third Parties againſt his Right. If the Lands were diſponed to him by the Proprietor, when on *Deathbed*, it is competent to his *Heir* to reduce it. If they were diſponed by a *Debitor obæratus*, a Reduction may be competent to his *Creditors*. If they were diſponed by a Proprietor *limited* by an *Entail*, it may be competent to the *ſubſtitute Heirs*. But ſuch *Objections*, or *Grounds* of *Reduction*, are competent to the Parties intereſted, and to none other; and if they do not inſiſt, the Property is effectually veſted holden of the Crown, and muſt intitle the Crown-vaſſal to the Qualification conſequent thereon.

For it is entirely erroneous that is laid down by the Reſpondent, "That the Privilege given to the Freeholders to reviſe "the Rolls, authoriſes them to inquire into the Foundation of "the Titles of every Perſon who claims to be inrolled, and to "conſider whether they are unexceptionable Titles of Property, "or liable to Objection." Were this the Caſe, the Freeholders would be erected into a *Court* for trying *Competitions*, after a very new and extraordinary Manner: To ſtir up and try *Objections* to People's Rights, who are in the *undiſturbed Poſſeſſion* of their Lands, when *no Objection* is ſuggeſted by the *Parties* who

who have the only *Title* to inſiſt upon them. It would be very unlucky for the Subjects, if ſuch a Power were devolved. But the Law ſtands clearly otherwiſe. It requires no more, but that the Freeholder be *publicly infeft*, in *Property* or *Superiority*, and *in Poſſeſſion* of *Lands* to the Extent preſcribed. If he is *infeft* by the Crown, and *in Poſſeſſion*, the Freeholders have no further Concern. It is not to be expected, that he will be allowed to continue long in Poſſeſſion, if his Right is liable to any ſolid Objection at the Inſtance of third Parties: It will ſoon be tried by thoſe who have the proper Intereſt; and, if well founded, will be ſuſtained; which will, of courſe, determine his Right. But, in the mean Time, the Freeholders have no Title to enter into ſuch Competition, or to inquire into the Progreſs of his Right to the Lands; which, if it were to be canvaſſed, behoved to be carried back to the Years of Preſcription. This is plainly none of their Province. If he proves the *two Points* mentioned in the *Statute*, his Title to be inrolled falls to be ſuſtained.

Object. II.

The *ſecond* Objection is founded upon the Entail of Mr *Porterfield* the Vaſſal. It is ſaid, "That when a Vaſſal in an entailed Eſtate, purchaſes a Superiority, in terms of the Statute, no third Party, who muſt ſee the Rights of their Author, can ſafely purchaſe from them; becauſe ſuch Purchaſe is directly contradictory to the ſtatutory Condition of the Right."

This, to the Petitioners, with great Submiſſion, is abſolutely incomprehenſible. There is not one Word in the Statute that points at laying the Vaſſal under any Entail or Limitation, with reſpect to the Superiority he purchaſes, whether the Property was entailed or not. It is *triti juris*, that the Entail of a Superiority will not draw alongſt with it the Property afterwards acquired by the Heir of Tailzie; far leſs can the Entail of the Property draw into its Fetters an Acquiſition of the Superiority, which is the *jus nobilius*, and paramount to the other. So far has the Preſumption for Liberty gone, that a Superior, limited

by an Entail, acquiring the Property, and extinguiſhing the ſame by an Inſtrument of Reſignation *ad remanentiam*, was yet found intitled to poſſeſs it without Limitation, and diſpoſe of it at Pleaſure. And therefore, with Submiſſion, there does not appear a Colour to ſay, that the Limitations impoſed on Mr *Porterfield* by his Predeceſſor, who was Vaſſal to the Earl of *Glencairn*, can have the ſmalleſt Effect to limit the Superiority which he afterwards acquired from the Earl without any Limitation.

Object. III. The *third* Objection, "That the Liferent conveyed to the "Petitioner of theſe Superiorities, is not a true or real Eſtate. "It is only nominally conveyed to them; for no more is given "them than a Right of Liferent. The Fee, by the Vaſſal's "Diſpoſition, returns back to the Earl of *Glencairn*, and his "Heirs. And the Reſult of the whole is, that a Superiority, "which could not be diſponed by the Earl to the Petitioners, "appears veſted in them in Liferent, and the Fee remains as "it did with the Earl: A Vote is created, but nothing elſe "ſubſtantial:"

Anſwer. This Objection, in the Anſwers, is blended with the two former, in order to give them the greater Colour. But as the other two have been already ſhown to be groundleſs; ſo this laſt, whether taken ſeparately or jointly, will appear to be equally without Foundation. It cannot but appear very extraordinary to your Lordſhips, who have had ſo many Queſtions anent Superiorities lately before you, in theſe Matters of Election, to hear the Conveyance of two Superiorities treated as *nominal* and *fictitious*, and transferring no *ſubſtantial Right*, when you are informed, that the Value of theſe Superiorities is aſcertained by the Agreement made betwixt the Superior and Vaſſal, in purſuance of the Directions in the Act of Parliament, at no leſs Sum than *L.* 420, 17 *s. Sterling*. This is the Price of theſe Superiorities, which the Truſtees appointed in Terms of the Statute are bound to lay out, in conſequence of this Sale, for Behoof of the Heirs of Tailzie, as the Act directs. And the Petitioners may without Scruple affirm, that there are *twenty*

Superiorities

Superiorities in *Scotland*, which have either been ſuſtained by your Lordſhips, or admitted by the Freeholders of the ſeveral Counties, as giving a *legal Title* to *a Qualification*, that are not of equal Value with the *two Superiorities* now called in queſtion.

Your Lordſhips will remember the Queſtion that was much debated by the Freeholders of the Shire of *Lanark*, in the Year 1754, with reſpect to the Inrollment of Sir *John Maxwell* of *Pollock*, who claimed upon Superiorities of certain Acres and Parcels of Land, ſome of which held Blanch of him, and others Feu, for Payment of a *Penny Sterling* of *Feu-duty*, and the *Entry* of *ſingular Succeſſors*, the only Caſualty incident to ſuch Holdings, was taxed at a *Shilling Sterling:* So that the Value of the Superiority, at the Rate of *thirty Years* Purchaſe of the *Feu-duty*, and *two Years* of the *Entry*, could not exceed 4 *s.* 6 *d. Sterling*; and yet, after full Debate, your Lordſhips ſuſtained Sir *John*'s Title as ſufficient for being inrolled, and diſmiſſed the Complaint.

It then appeared to your Lordſhips, that no other Judgment could be given in ſuch Caſes in Conſiſtency with the Law, while it continues as it now does, and is not altered by the Legiſlature. Every Superiority, whether *Blanch* or *Feu*, does by Law intitle to a Qualification to elect a Member of Parliament; nay, they are the *only Superiorities* which, as the Law now ſtands, can give ſuch Title. The Superior is, in the Conſtruction of Law, in Poſſeſſion of the Lands holden of him, *quoad* all Mankind, except his Vaſſal; and the Vaſſal's Poſſeſſion is held to be the Superior's Poſſeſſion with reſpect to this Qualification.

The Law makes no Diſtinction whether a Superiority yields more or leſs Profit to the Superior. If the Lands are held of him, though for Payment only of a *Blanch Duty* of *two Pennies Scots*; nay, if the other Caſualties of the Superiority were diſcharged, or taxed to the moſt trifling Sum; yet ſtill, if he remains Superior, the Lands poſſeſſed by his Vaſſal muſt be repreſented by him, and by none other, as he is the only Vaſſal of the Crown in theſe Lands. Every Freeholder whoſe Eſtate, whether

whether poſſeſſed by himſelf or his Vaſſal, amounts to the Valuation required by Law, muſt repreſent theſe Lands, by electing a Commiſſioner to ſerve in Parliament. And nothing would be more dangerous, for giving Riſe to arbitrary Proceedings, than to allow Freeholders to enter into Inquiries anent the Extent of the Profit that might be drawn by every Party who claims to be inrolled; and to admit or reject the Claim according to the Notions they might happen to form thereanent. This is what no Law would permit, unleſs, at the ſame Time, it had eſtabliſhed a *Boundary* or *Standard* by which the Freeholders were to judge, and within the *Extent* of which they were to admit no Claim. But as none ſuch is ſettled, but the moſt trifling *Blanch* or *Feu Duty* is every Day ſuſtained as a ſufficient Qualification, where the Liferent or Fee of the Superiority is truly veſted in the Claimant, the Reſpondent's whole Declamation upon this Head reſolves in no more but a Sound, without any real Foundation in Law to ſupport it.

The Reſpondent frequently calls into his Aid the Words *nominal* and *fictitious*, which occur in the Act of the 7th of the King, but are obviouſly miſapplied to the preſent Caſe. He ſays, "It was not intended that any ſolid or ſubſtantial Right "ſhould be veſted in the Claimants. The Diſpoſitions by Mr "*Porterfield* are only granted to them in Liferent, and to the "Earl of *Glencairn* and his Heirs in Fee. He does not ſay, "that a fair and true Purchaſe of an Eſtate, even where the "Purchaſer has in view to become a Freeholder, is any wiſe illegal: But he maintains, that this is not a fair and true Purchaſe, but a nominal Eſtate, created purely to enable to vote, "and no wiſe to give to the Poſſeſſor a ſubſtantial or *patrimonial Right*."

But here the Reſpondent plainly miſconſtructs the Import of the Words *nominal* and *fictitious*; which is the more extraordinary, as it is very clearly explained by the Statute to which he appeals. It is there oppoſed to a *true* and *real Eſtate*. The Freeholder is bound to declare, "That his Title to the Lands "is

" is a *true* and *real Eſtate* in him, *for his own Uſe and Benefit*, " and for the Uſe of no other Perſon whatſoever:" And, on the contrary, a *nominal* and *fictitious Title* is there deſcribed to be, " where the Party has given any Promiſe, Obligation, Bond, " Backbond, or Security, other than appears from the Tenor " and Contents of his Title, for rediſponing or reconveying the " Lands and Eſtate any manner of Way, or for making the " Rents or Profits thereof forthcoming for the Uſe or Benefit " of the Perſon from whom he acquired it, or any other Per- " ſon whatſoever."

The Difference betwixt theſe two oppoſite Titles, does not depend upon the *Extent* of the *Profit* the Party may draw out of the Lands; elſe the Law would have aboliſhed *Blanch Holdings*, and the moſt of *Feu*, where the Duties are ſmall. Nor does it depend upon the Views the Party may have had in acquiring the Right; for, as the Reſpondent juſtly allows, the Law does not condemn any Perſon for acquiring Titles to Lands with a View to become a Freeholder, and concur as far as he can in ſending a fit Repreſentative to Parliament. Such Motive is in itſelf laudable, and needs not be diſguiſed either by the Diſponer or the Acquirer, if it is attained by Means conſiſtent with Truth.

But the Diſtinction between theſe two kinds of Titles lies in this: It is *true* and *real* where the whole Intereſt or Eſtate that appears to be veſted in the Party by his Titles produced, ſtands truly in him for his own behoof, without any latent Deed or Obligation to carry it away from him to another; and, on the contrary, where he lies under any ſuch Obligation that tends to defeat his Right, it is termed *nominal* and *fictitious*. It is obvious, this Deſcription can no wiſe apply to the Petitioners Titles, more than to any other Rights of Superiority in the Kingdom. It makes no Difference, that they are Liferenters only. The Statute 1681 declares, that *Liferenters* have a Right to vote; and your Lordſhips have again and again found, that this extends to *Liferents* of *Superiority*, as well as *Property*.

The *Liferent* of this Superiority is of much greater Value than the *Fee* of many Superiorities which are every Day intitled and admitted to be inrolled. And the Objectors have not pretended to diſpute, that the Liferent is truly veſted in the Claimants, according to the Tenor of their Titles, without any Promiſe or Obligation whatever that can tend to defeat or impair it; and conſequently they have no Reaſon to diſpute, that this is a *true* and *real Eſtate* in the Claimants, and gives them the full *patrimonial Rights* that appears from their Titles. It is competent to them, not only to *reap* the *Profits*, but alſo to *diſpoſe* of the *Right* as they have a mind; and if they contract Debts, it is liable to be *affected* by the *Diligence* of their *Creditors*. In a Word, it is intitled to every Conſequence of a *true* and *patrimonial Right*; and as it is ſuch as your Lordſhips have always found ſufficient to intitle to the Privilege of a Freeholder, it is plain, that this Objection, which makes the chief Figure in the Debate on the Reſpondents Side, cannot in any Senſe apply to the Titles produced by the Petitioners.

Object. IV. & V. and Anwers.

The laſt two Objections ſtated at the *Michaelmas* Meeting are but faintly mentioned in the Anſwers to the Petition, as indeed they appeared to be of no Weight. It is undoubtedly competent to every Vaſſal to *ſell* a *Part* of his *Lands*, as it is in the Power of his *Creditor* to appriſe or *adjudge* a *Part* correſponding to his *Debt*: And in either Caſe the Law obliges the *Superior* to receive either the *Purchaſer* or *Adjudger*. It is unneceſſary to inquire, whether he is alſo bound to divide his *Reddendo*, or if he has both Tenements bound for the whole; and the Purchaſers are bound to relieve one another *pro rata*. Whether the one or the other is ſuppoſed, the Purchaſer's Right is equally unchallengeable; and conſequently the Objection can have no Influence on the preſent Queſtion.

And as to the Diviſion of the Valuation, it was made by a general Meeting of the Commiſſioners, upon a Proof adduced before their Committee, reported to them. The Decreet of Diviſion is produced in Proceſs; and a Certificate was laid before the

the *Michaelmas* Meeting, of the Amount of the Valuation ſtated in the Books conform thereto; which is all that is uſually done. It is unneceſſary to lay the Proceedings of the Commiſſioners before the Meeting; as your Lordſhips have found, that the Freeholders have no Title to canvaſs or review their Proceedings.

Mr Cunnyng-hame's Qualification.

It remains only to conſider the Objections made to Mr *Cunnynghame*'s Titles. The Titles are fully ſet forth in the Petition and Complaint, with the whole Objections made to them at the *Michaelmas* Meeting, which were much the ſame with thoſe made to the other Petitioners; and they are ſo fully anſwered in the Petition, that it is unneceſſary to add any more upon that Head.

But the Reſpondent, in his Anſwers, has taken up new Ground, and broached ſome Objections that were not ſuggeſted at the Meeting. Theſe ſhall now be conſidered.

Object. I.

The *firſt* is, That although Mr *Cunnynghame*'s Claim is founded upon a Retour of *Alexander* Earl of *Glencairn*, as Heir to his Father Earl *William*, the High Chancellor of *Scotland*, in the Year 1666; by which the Lands of *Craigbait* and *Kerſemeadow* are retoured to extend to the Value of *L.* 5 of old Extent; yet, in the Precept of *Clare conſtat*, granted by the Earl of *Glencairn* to Mr *Porterfield* the Vaſſal in 1757, the Lands are deſcribed, " the Forty Shilling of *Craigbait* and Merk Land of *Kerſemea-*" *dow*, lying in the Pariſh of *Kilmacolm*." And it is obſerved, " That the Precept was granted before the Earl was infeft in " the Lands; but as it was drawn by Mr *Cunnynghame*, it muſt " at any rate be Evidence againſt him, that theſe are not the " whole Lands contained in the Retour: And it is incumbent " upon him to condeſcend where the Remainder of this Five " Pound Land lies; otherwiſe he has no Title to be inrolled, as " the Extent contained in the Retour 1666 cannot now be " ſplit or divided."

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Anſwer.

This is a very new Way of making out an Objection, by endeavouring

deavouring to diſcredit the only Document that is referred to for proving it. If the Precept of *Clare* 1757 gives the Vaſſal no Title to the Lands, it will hardly be found of ſufficient Weight to redargue the legal Documents produced by the Petitioner of his Claim to a Qualification, *viz.* the *Retour* 1666, and his own *Charter* and *Infeſtment* under the Great Seal. The Petitioner cannot be anſwerable for the Deſcription of the Lands inſert in the Vaſſal's Precept, as he behoved to copy that from ſuch Writings as were then laid before him. But he is adviſed, that the Titles he has produced are ſufficient to inſtruct his Claim; and that this Objection, which was not once mentioned at the Meeting, and therefore can have no Effect to juſtify the Proceedings of the Freeholders, is not, now when it is ſtarted, any wiſe relevant to overturn his legal Title.

For your Lordſhips will know, that the Lands of *Craigbait* and *Kerſemeadow* appear, by the Retour 1666, to lie within the Barony of *Duchal*; and as that Barony is known to lie within the Pariſh of *Kilmacolm*, ſo, from the Valuation-books of the County, it appears, that the Lands of *Craigbait* and *Kerſemeadow*, lying in that Pariſh, are ſeparately valued at *L.* 110 *Scots*. Theſe are the very Lands which are held by Mr *Porterfield* of Lord *Glencairn*; nor are there any other Lands in that Barony or Pariſh that can be brought under the Deſignation in the Retour. This is full Evidence, that the Petitioner is poſſeſſed, by Mr *Porterfield* his Vaſſal, of the whole Lands that were contained in that Retour; as the Reſpondent does not pretend to condeſcend upon any Lands within the Barony or Pariſh, which would come under this *Valen.* of *Five Pound*, other than Mr *Porterfield*'s Lands, which are ſtated under the ſame Deſcription in the Valuation-books of the Shire.

It is not eaſy to account for the many erroneous Deſcriptions that occur in Vaſſals Charters, particularly as to *Pound Lands* and *Merk Lands*. Such vague Deſcriptions in theſe Charters were never conſidered as any Evidence of the *Old Extent*; and ſtill leſs can they be ſufficient to overturn the *legal Evidence* which ariſes

ariſes of it from the proper Document the Law requires for inſtructing it. This is not the only Inſtance where Lands are differently deſcribed in Mr *Porterfield*'s Charter from that of the Earl of *Glencairn*'s his Superior. But ſuch Diſcrepancies, which happen by various Accidents, can never take off the Force of the legal Evidence of the Old Extent, founded upon a *Retour*, ſupported by the *Superior's Titles*, and the *Valuation-books* of the County.

In a Word, the Retour proves, that the Earl of *Glencairn* was poſſeſſed at that Time of the Lands of *Craighait* and *Kerſemeadow*, valued at a *Five Pound* Land of old Extent. It is not alledged, that any Part of theſe Lands were diſpoſed of by the Family, until the Year 1733, when the late Earl conveyed theſe very Lands of *Craigbait* and *Kerſemeadow* to his ſecond Son Mr *John Cuningham*. And as the Petitioner has taken the Lands out of his *hereditas jacens* by Adjudication, and ſtands infeft therein under the Great Seal, it cannot be competent to any of the Freeholders to object to his Right to the Lands, which are wholly contained in his Titles, unleſs they could condeſcend that any Part of them is poſſeſſed by another; which they neither can, nor have attempted to do in the preſent Caſe.

" That the Precept of *Clare* 1757 refers to a Charter granted by the Earl of *Glencairn* to *John Porterfield*, in 1681, containing a Diſcharge and Exoneration of the yearly Feu-duty, by the Earl, to *John Porterfield*, of all Years and Terms bygone, and in Time coming." And from thence it is inferred, " That the Petitioner cannot be ſaid to be in Poſſeſſion, " ſo as to be intitled to be inrolled." Object. II.

But as the Fact is not proved, from the Documents referred to by the Reſpondent; ſo neither is it relevant, if proved, to infer the Concluſion. As the Earl and his Doer would have been very loth to take any Advantage of Mr *Porterfield*, in granting him a Precept of *Clare*; ſo care was taken to inſert every Reference that appeared Anſwer.

in the Writings ſhewn to them; and particularly, this Reference to the Charter 1681, though the Charter itſelf was not produced. But the inſerting ſuch Reference will not deprive the Superior or his Succeſſors of the Feu-duties, unleſs the Vaſſal can prove his Liberation, by Production of the Charters on which he pretends to found it. And accordingly there is very properly inſert in the Precept a Clauſe to ſave the Superior's Right, as follows: "Saving and reſerving always the foreſaid reſpective Feu "and Blanch Duties for all Years bygone unpaid, as well as "Years to come, and every other Perſon's Right, according to "Law." Had the Reſpondent adverted to this Clauſe, he would not have founded on the Reference to the Charter, as a Liberation from a Claim that is expreſsly reſerved.

2*do*, If the Feu-duties were ſuppoſed to be diſcharged, that would not be relevant to exclude the Superior's Right to be inrolled in virtue of the Lands. As the Lands are of a ſufficient Extent to intitle to a *Qualification*; ſo it can only be competent to the Perſon who ſtands infeft therein as *Vaſſal* to the *Crown*. Neither a *Diſcharge* nor *Aſſignation* to *Feu-duties* is ſufficient to extinguiſh or annihilate the *Right* of *Superiority*: It ſtill remains with the Crown's Vaſſal; and, even after the Diſcharge, is equal to a Blanch Holding, which yields no annual Profit, but has many other important Conſequences attending it. The Superior is ſtill intitled to all the Caſualties of Superiority; to *Nonentries*, to *Reliefs*, to the *Compoſitions* paid for the *Entry* of *ſingular Succeſſors*; to *Liferent-eſcheat*, if it falls, which may ſtill happen, even as the Law now ſtands: And he is alſo intitled to bring Actions of *Reduction* and *Improbation* againſt his Vaſſals.

In a Word, the Superior has the full Right of the Lands, in ſo far as the Vaſſal's Right does not exclude him. He is anſwerable to the Crown for whatever is due out of the Lands. The Vaſſal's Poſſeſſion is conſidered as the Superior's; and he is, in the Eye of the Law, held to be in Poſſeſſion, though he were to reap no annual Profit out of the Lands. This was the

the Caſe of the moſt proper Superiorities, *viz. Ward Holdings*, before they were aboliſhed; and is ſtill the Caſe of *Blanch Holdings*; and yet it was never doubted, that both theſe Holdings intitled the Superior to be inrolled. His Title does not depend either upon the *Extent*, or the frequent *Return* of the *Profits* which thence accrue to him; but upon his paramount Right to the Lands, which intitles him to found upon his Vaſſal's Poſſeſſion, as accruing to his Right, to ſupport all its legal Conſequences.

The Reſpondent, after throwing out theſe new Objections, recurs to the former, That this Title, as well as thoſe of the other Petitioners, is nominal and fictitious. But as he gives no better Reaſon for it, but that the Superiority ſtands veſted in the Petitioner only in *Liferent*, and the Earl in *Fee*, he cannot prevail, unleſs he get the better of the *Act* of *Parliament* 1681, and of your Lordſhips repeated *Deciſions*, by which ſuch Liferents are daily ſuſtained as legal Qualifications. And as this Point has been already fully explained, in conſidering the other conteſted Titles, the Petitioner will not conſume your Lordſhips Time with enlarging further upon it, or reſuming the Anſwers already offered; which, it is hoped, will prove fully ſatisfactory to the Court.

In reſpect whereof, &c.

JAMES FERGUSON.

1. Feb: 1760

Prestongrange as the Law stands the different of a superiority intitles to a vote

2 Justice to the freeholders to object as the right of the heirs of in tail 2.

This is a right defeasable at the pleasure of the heir of intail — not a true & real estate, it proceeds a non batente

President when the Kings Barons were obliged to attend a real estate then necessary

But the Law altered the Kings vassal Lords bench of him hereafter a very small interest, and not now so necessary that every freeholder should have a substantial right

Thanfield & Garlmore have a good vote.

The gentlemen intended to have made out the rights on the act 20. of the King.

But the freeholders cannot judge of the objections on the right of the heir of entail

The Lords ordain these two gentlemen to be added to the Roll.

Lord Coalston. the objection that the rectors of these Lands is of Land nor Cunninghame only right to 4 0 0 Sh: & 1 Mark

2. the lands not in Mr Cunninghams profession another orgnal infeft in them.

The Barr to clear up the fact on this first objection

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